No. 6405

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HENRY HEINE,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Appellee.

Appellants' Reply Brief

Upon Appeal from the United States District Court for the District of Oregon.

HON. R. S. BEAN, Judge.

C. T. HAAS and E. B. SEABROOK,
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ARGUMENT

This reply brief is necessarily in anticipation of the contentions that defendant intends to advance in its brief. The only guide we have to that intention is the fact that defendant filed in this Court a praecipe demanding the printing, as a part of the Transcript of Record, of a voluminous mass of affidavits, which were filed in the lower court ostensibly as bearing on the proper exercise of a discretion, that the court was assumed to have, as to whether it would retain jurisdiction. This additional matter is entirely immaterial and irrelevant to the sole and only question raised by the appeal. Inasmuch as respondent must have some purpose in calling for the printing of such additional matter, we anticipate that the purpose is to argue to this Court that the lower court had no jurisdiction of the subject matter, notwithstanding that respondent conceded in the lower court that the district court did have such jurisdiction

(Trans. Rec., p. 562.)

Acting upon that anticipation we will now undertake a reply to what we expect counsel will contend.

The position and contention of respondent in the lower court was that, even though jurisdiction of the subject matter existed, the court had a discretion as to whether or not it would exercise that jurisdiction, and this voluminous mass of affidavits was filed for the avowed purpose of guiding and persuading the exercise of that discretion so that the cause be dismissed. The lower court found and decided that it did have jurisdiction of the subject matter, but also

further decided that it possessed a discretion as to whether it would exercise that jurisdiction and then exercised the discretion by dismissing the cause.

The sole and only question raised by the appellant here is whether the said discretion existed, and appellant contends that no such discretion was vested in the Court, and that its decision that it had jurisdiction necessitated a retention of the case for trial on the merits.

The judgment of dismissal was pursuant to a motion to dismiss, supported by affidavits, although the matter contained in the affidavits had been pleaded as a defense in the answer.

The motion to dismiss, insofar as it is based on a want of jurisdiction, is founded upon facts which do not appear upon the faces of the petition for removal or of the complaint.

In such cases the general rule is that a challenge of the jurisdiction cannot be made by motion, but must be raised by plea. It is only when a want of jurisdiction affirmatively appears on the face of the complaint that it can be raised by motion.

Desert King Co. vs. Wedekind, 110 Fed. 873, 877.

Smith vs. Kernochan, 7 How. 198, 216.

Wickliffe vs. Owings, 17 How. 47.

Eberly vs. Moore, 24 How. 147.

Hartog vs. Memory, 116 U. S. 588, 6 Sup. Ct. 521.

Ry. Co. vs. Pinkney, 149 U. S. 194, 199, 13 Sup. Ct. 859.

This rule necessarily results from the requirement that the facts showing a want of jurisdiction must be found by the Court to a legal certainty.

Wetmore vs. Rymer, 169 U. S. 118, 18 Sup. Ct. 294.

If the facts, showing the want of jurisdiction of the subject matter, appear on the face of the complaint they are, of course, binding on plaintiff and the court is thereby advised thereof to a legal certainty. But, if the facts, depended on to show a want of jurisdiction of the subject matter, do not appear on the face of the complaint, they should be presented by a formal plea upon which issue may be joined and be determined in the regular way, so that all parties may have the benefit of cross-examination. In that way the legal certainty required by the law may be obtained, which is not true of a motion and ex parte affidavits.

These facts, upon which respondent relies to show a want of jurisdiction, are pleaded by a formal plea in the answer. They are put in issue by the reply. Appellant is entitled to have that issue determined by a jury. The issue should be submitted to the jury separately and independently of the issues on the merits.

Farmington vs. Pillsbury, 114 U. S. 138, 5 Sup. Ct. 807.

Hartog vs. Memory, 116 U. S. 588, 6 Sup. Ct. 521.

Terry vs. Davy, 107 Fed. 50.

The better practice is, when a plaintiff's case shows a bona fide claim within the jurisdiction of the court, with a reasonable plausibility in support thereof, to pass the question of jurisdiction of the subject matter until the cause is considered on its merits on formal pleadings.

Millinger vs. Hartupee, 6 Wall. 258.

Douglas vs. Wallace, 161 U. S. 348, 16 Sup. Ct. 485.

City Ry. Co. vs. Citizens Ry. Co., 166 U. S. 557, 563, 17 Sup. Ct. 653, 655.

York County Sav. Bank vs. Abbott, 131 Fed. 980.

And such is the original procedure adopted by respondent. It made a formal plea in its answer tendering issue as to the alleged facts on which the pretended want of jurisdiction of the subject matter is predicated. Issue was joined hereon by the reply and a trial of the issue was expected to be had by appellant in the regular way.

But respondent has taken many inconsistent positions. First, it filed and verified a petition for removal wherein it alleged that the lower court *had* jurisdiction of the subject matter. Next it filed an answer wherein it raises the objection that the lower court *had no* jurisdiction thereof, by alleging facts which it asserts deprived the court of such jurisdiction. And then, when those facts were denied and put in issue by the reply, respondent filed a motion to dismiss and presented a number of ex parte affidavits

in support thereof, which affidavits undertake to establish the very facts which are in issue on the said pleadings. Thus, it can be seen, that after raising the question by formal pleadings upon which issues of fact are made, which is the proper and regular procedure, respondent then attempts to establish these facts in an ex parte proceeding by affidavits, so that appellant is deprived, not only of his right of cross examination, but also of his right to have the issue determined by a jury.

We know of no legal precedent for any such procedure.

Certainly there is no such practice or procedure known to the law of the State of Oregon; and it is by that law and the practice of the courts of Oregon that the question of jurisdiction of the subject matter is to be determined, there being no federal question involved. When jurisdiction of the federal court depends solely upon diversity of citizenship, or by virtue of alienage on one side and citizenship on the other, a determination of the essential elements of jurisdiction required by Sections 41 and 71 of Title 28 U. S. C. A., is made according to the rules and practice of the federal court. But when the question is one of jurisdiction of the subject matter only, and there is no federal question involved, then the state law applies and the practice of the state courts prevails.

That the law applies see

25 C. J. 829, Sec. 163.

That the state practice prevails, see

Crowley vs. N. P. R. R., 159 U. S. 569, 16 S. Ct. 127.
Phelps vs. Oaks, 117 U. S. 236, 6 S. Ct. 714.
West vs. Smith, 101 U. S. 263.

It has been said that on removal of a cause to the federal court, the party removing it is estopped and will not be heard to question the jurisdiction of the federal court of the subject matter, but may challenge such jurisdiction of the state court only.

Tootle vs. Coleman, 107 Fed. 41.

The point is that the federal court must enforce such rights as the plaintiff has under the state law. And if the state court has jurisdiction of the subject matter, it cannot be deprived thereof by a removal of the cause, but the federal court must also take jurisdiction thereof.

Note 54, Sec. 81, Title 28, U. S. C. A., page 666.
Texas, etc., Co., vs. Humble, 181 U. S. 57, 21 S. C. 526, 528.

The case last cited well illustrates the point. Under a state statute a married woman was entitled to sue for damages, in her own name, for personal injuries. Such a woman began such an action in her own name in a state court. It was removed to the federal court, and there a motion to dismiss was filed upon the ground of a want of jurisdiction of the subject matter in that the husband was not the plaintiff. The Supreme Court held that jurisdiction of the subject matter was governed solely by the state law.

As we have repeatedly said, the jurisdiction of the state court is well settled. In fact, it was conceded in the lower court by respondent. (Page 562, T. of Rec.) And, as previously stated, the Oregon Supreme Court and this court have both sustained the jurisdiction of the state court.

A challenge made now to the jurisdiction of the subject matter is, therefore, necessarily a contention that the *state court* had no such jurisdiction. And, inasmuch as the challenge depends upon facts not appearing on the record, it cannot be raised by motion, but must be presented and tried by and upon the pleadings.

It is admitted here by the verified petition for removal filed by respondents that the elements of federal jurisdiction exist, and therefore it is only a matter of the jurisdiction of the state court of the subject matter which is now sought to be raised, after the same was admitted and conceded in the lower court. The right of the state court to entertain the action must, as we have said, be determined by state law and according to the practice of the state courts.

The court of last resort in Oregon has sustained jurisdiction of the subject matter in State ex rel vs. Tazwell, 125 Or. 528. And if it had not, this court has done so in the case of Denver Co. vs. Roller, 100 Fed. 738, where a California statute identical with the Oregon statute was held to confer jurisdiction on the California courts of a transitory action which arose outside of California and against a non-resident of California.

When the cause was removed from the state court, that court had jurisdiction of the subject matter thereof. It follows that any matter presented afterwards in the federal court to challenge that jurisdiction, is a matter of defense and cannot be raised by motion, but only by proper pleadings.

The grounds upon which the alleged want of jurisdiction is predicated are these:

First: It is said that by the law of Germany and by the policies, exclusive jurisdiction of any action upon such policies is vested in the German courts.

Second: It is said that the policies are German contracts and the rights, duties and liabilities thereunder are governed exclusively by German law; and that the German law, known as the Valorization Act, has required all insurance companies to turn over all their assets to certain government officials who will administer them and give to each policyholder his proper proportion thereof; and a tribunal has been created to carry out the provisions of that act. It is a sort of bankruptcy proceeding applicable only to insurance companies. The contention of respondent is that resort to the said German tribunal is the only remedy open to plaintiff, and therefore the district court has no jurisdiction of the case.

And it is further contended that by a German law, enacted since the policies were issued, payments of debts due in German marks, may be made at a certain designated rate, and that appellant's action is not based on such rate of recovery.

In each and every of these premises the respondent is entirely wrong.

The first claim—that of the exclusive jurisdiction of the German courts, was taken to the supreme court of the state of Oregon, and there decided adversely to respondent's contention.

State ex rel vs. Tazwell, 125 Ore. 528.

Moreover, the United States supreme court as well as other federal courts, have repeatedly held that laws of states or foreign countries providing that a particular remedy is exclusive or that relief can only be obtained in some designated court, or agreements by parties to that effect, are not binding upon the federal courts, who are vested with their jurisdiction by the United States Constitution and by acts of congress, and cannot be deprived thereof by foreign laws or agreements of parties.

Madisonside Traction Co. vs. St. Bernard Co., 196 U. S. 239, 252, 253.

Grover vs. Merritt Co., 7 Fed. (2d) 917.

Insurance Co. vs. Morse, 20 Wall (87 U. S.) 445.

Gough vs. Hamburg, etc., 158 Fed. 174.

Mutual, etc., Association vs. Cleveland Mills, 82 Fed. 508.

Furthermore, this is not an action upon the policies at all, but is an action for damages for the repudiation and wrongful cancellation of the insurance contracts by respondent.

Cooley's Briefs on Insurance (2d Ed.), Vol. 5, p. 4694.

Lovell vs. St. Louis Mut. Ins. Co., 111 U. S. 264, 4 S. Ct. 390.

The very foundation and basis of the second claim, i. e., that the policies are German contracts, governed and controlled by German law, is hopelessly erroneous. The contracts are New York contracts.

It will be noticed that the complaint alleges that respondent is a mutual life insurance company, and that the policies are mutual contracts (p. 88, Trans. Rec.). And this is admitted in the answer, there being no denial thereof. (Par. 1, p. 8, Trans. Rec.) The law of the state of New York forbids such companies from discriminating between its policyholders of the same class. And this law is pleaded in the reply. (Par. III of the further and separate reply to the third separate answer and defense, pp. 132 and 145, Trans. Rec.)

In the affidavit of the vice-president of the respondent (which is not an affidavit at all, but an argument on the merits), the following statement of facts is made, viz:

> "The defendant is a purely mutual company. It has no stockholders and no capital funds and *all its assets and earnings are equitably the property of the insured.* Since a mutual insurance company has no assets which do not belong to its policy holders, it makes no profits in relation to them. Its sole function is to *provide them with the protection defined by the terms of their policies* at the actual cost thereof. * * * * *Under the principles of mutuality, as accepted and ap-*

plied in the insurance business and by insurance authorities throughout the world, it is recognized that a mutual insurance company is essentially a trustee for the various groups of its policy holders and that it should deal equally and fairly between them and should have no favorites among them." (P. 468, Trans. Rec.)

These considerations bring the case squarely within the principles of two recent decisions of the United States supreme court, wherein it is held that by reason of the necessity of preserving the principle of mutuality, and to insure equal and fair dealing with the members and policy holders, and prevent discriminations, the contract between the member or policy holder and the insurance company must be construed and interpreted by one law, and the rights, duties and liabilities thereunder be measured by a single standard, and that law and standard is held to be the law of the state of the creation of the insurance company.

Supreme Council vs. Green, 237 U. S. 531, 35 Sup. Ct. 724.

Modern Woodmen vs. Mixer, 267 U. S. 544, 45 Sup. Ct. 389.

In other words, it is impossible to preserve the mutual idea, or accord fair and equal treatment among all policy holders, or prevent discriminations, if the mutual insurance contract is to be construed in England by English law, in France by French law, in Germany by German law, etc.; and the necessity of applying a single standard has impelled the Supreme Court to adopt the law of the place of the insurance

company's creation as the standard by which the rights, duties and liabilities of the parties are to be measured.

Justice Holmes very clearly states the doctrine in the following language:

> "The indivisable unity between the members of a corporation of this kind in respect to the fund from which their rights are to be enforced, and the consequence that their rights must be determined by a single law, is elaborated in Supreme Council vs. Green, 237 U. S. 531, 542.— The act of becoming a member is something more than a contract—it is entering into a complex and abiding relation—and as marriage looks to domicil, membership looks to and must be governed by the law of the state granting the incorporation."
>
> Woodmen vs. Mixer, 267 U. S. 544.

While it is true that these two decisions concern fraternal insurance, yet the principle involved is precisely the same as that involved here. Mr. Buckner has explained that the entire undivided fund, consisting of *all* the assets of respondent, is a trust fund for the security of *all policies;* most of the policies so declare on their faces; the principles of mutuality and of equal and fair treatment must be preserved and discriminations prevented. It is, therefore, apparent that the same considerations which impelled the decisions in these two cases are present in this one, so that those decisions rule this case.

It follows that it is the law of the State of New York and not that of Germany which must be looked to for a determination of the rights, duties and liabilities of the parties.

As stated by Mr. Buckner, the respondent's vice-president, in his affidavit above quoted, all the assets of the company constitute a trust fund in the hands of respondent for the enforcement of the policies issued by it. This also appears expressly in most of the policies issued. And all policyholders—German as well as those of other nationalities—are entitled to fair and equal treatment without discrimination.

The events which have occurred are pleaded and set forth in the answer of the respondent, and they amount briefly to this: The respondent, which has a surplus in this country alone of over $400,000,000.00 (paragraph VI, page 138, Transcript of Record), organized in Germany a subsidiary insurance company known as "Kronos," to which company respondent turned over and transferred all its assets then located in Germany, *but none of its other assets.* Kronos and respondent on December 31, 1921, entered into an agreement whereby, in consideration of such transfer of the German assets, said Kronos undertook and agreed to perform all of respondent's German policies. This is alleged to have been done with the consent of the insured and a novation of the policy is claimed to have occurred, whereby respondent claims to have been released from all liability under the policy. (Defense of Novation, pp. 41 to 46 Trans. Rec. Plea in abatement in re Valorization Law, pp. 46 to 51, Trans. Rec.) Appellant denies any consent to such transaction and denies the alleged novation and discharge from liability; and also denies the plea in abatement. (Denial of Novation, Pars. IX, X, XI and XII of Reply, pp. 123-124 Trans. Rec. Denial

of Abatement, Pars. XIII and XIV of Reply, p. 124 Trans. Rec.). In conformity with the alleged Valorization Act said Kronos has turned over to the proper German officials all the assets *it had received* from respondent. And the contention now made is that because of those transactions, plaintiff's only remedy is against the said German assets so turned in by Kronos.

What has become of the duty of respondent to treat all its policyholders fairly and equally? What of the German policyholders' rights to enforce their policies against *all* the assets of respondent? What becomes of the functions, of which Buckner speaks in his affidavit, of the company to provide all policyholders with the protection defined by the terms of their policies?

Manifestly the scheme and plan adopted and carried out, as detailed in the answer, had for its aim and purpose the withdrawing from the German policyholders their right and interest in the trust funds consisting of *all* the assets of the company, and compelling them to resort solely to a small and inadequate part of it, viz., the German assets, which had been transferred to Kronos and then by it turned over to the valorization officials.

This elaborate scheme to violate its duty of treating all policyholders equally and to deprive the German policyholders of the security guaranteed them by their contracts, viz.: *all* the assets of the company, is no stronger than its weakest link i. e., the alleged novation contract. If that novation actually occurred

with the insured's consent, then respondent is relieved of liability. But otherwise respondent remains bound by its contract, and the compliance by Kronos with the alleged Valorization Act cannot avail respondent in any way or compel policyholders to proceed against the assets of Kronos, or deprive them of the right of enforcing their claims against the security of all the assets of respondent.

Whether or not this novation actually occurred is an issue on the merits of the case to be determined by a jury, and whether the Valorization Law actually exists, is an issue on the pleadings.

It must be remembered that the law of the State of New York goes with and is binding upon respondent wherever it transacts business. If that law prohibits any act of respondent, it cannot evade the force and effect of it in Germany any more than it could in New York.

Fletcher, Cyc. Corp., Vol. 8, pp. 9327-9332.
Canada So. R. R. vs. Gebhard, 109 U. S. 527.
McClement vs. Sup. Ct., 222 N. Y. 480, 119 N. E. 102.

Reducing counsel's contention to its final basis, it amounts simply to this: that the insured are deprived by German law from enforcing their policies against the assets of respondent located in the United States. That these assets are a trust fund out of which all policyholders are entitled to enforce their claims, is admitted in the affidavit of respondent's vice-president (p. 468 Trans. Rec.). Now, if we go to Germany

and there begin an action to enforce our claim *against the fund which is located in the United States,* the German courts will very properly say to us that they have no power to aid us, and that if we wish to proceed against the American assets we must go to the United States to do so, because there is where the fund is located. It is only against the assets in Germany that the German courts can proceed. The claim, therefore, that only German courts may enforce our claims, is equivalent to contending that in some way we have lost the security, guaranteed us by the policies, of the entire trust fund held by respondent. And yet the policies themselves give us an interest in *all* the earnings and profits of the respondent and guarantee us the security of all its assets, and this, Mr. Buckner says, is a fact.

Manifestly, we cannot be deprived of our interest in respondent's profits, or of the security of *all* its assets unless we have by contract agreed to that effect. Respondent, in its answer, pleads that we have so agreed. We have denied this. So the matter which is sought to be raised here is a matter of the merits of the case. And this cannot be determined here by this court upon affidavits.

It is very certain that German law has no power to compel respondent to transfer all its assets to the valorization officials; it is also very certain that respondent has not done so; nor does it intend to do so. Its contention is that this alleged German law binds us, but that it does not bind respondent; that we must accept only our proportion of what respondent has

turned in pursuant to that law, but that respondent need turn in only what it chooses. And that is said to constitute mutuality and fair and equal treatment.

The fact is German law has nothing to do with the matter. It cannot enforce compliance by respondent; it cannot construe and define the mutual rights and obligations of the parties; it cannot reach the trust fund in America and bring about its proper distribution. There is but one law which can do that and that is the law of New York. It is a matter of common sense that to enforce a claim upon a trust fund, resort must be had to the courts of the place where the fund is located.

It can, thus, be readily seen that the entire structure of respondent's claim of a want of jurisdiction is predicated upon the determination of the merits of the action. Whether or not there was a novation of the policies is the gist of the matter. If there was then, because of such novation and insured's consent thereto, the sole and only fund to which plaintiff could resort would be the German assets in the hands of the German valorization officials—and that only because the insured consented to the novation and accepted the promise of Kronos and its assets for the fulfilment of its contract, in lieu and stead of respondent's. But plaintiff has denied such consent, and has denied the acceptance of Kronos and the release of respondent, and has denied the novation; and has alleged that the attempted novation and the express repudiation of the policies by respondent, based on said alleged novation, is a wrongful cancellation of

his contract, on account of which he is entitled to damages. (Pars. III and VI of each cause of action, pp. 89-91-94 Trans. Rec.) These issues manifestly must be tried by a jury and cannot be summarily disposed of on ex parte showings by affidavit.

If the fact be found to be that appellant did not consent to the novation, and did not accept Kronos and its assets for the fulfillment of his contract in the place and stead of respondent, then the fund turned into the hands of the valorization officials *does not* constitute the *whole,* or even a substantial portion of the funds out of which appellant is entitled to enforce his policies. And the express repudiation of the contracts by respondent and its refusal to be bound thereby, gives appellant his cause of action against respondent for damages enforcible out of any assets of respondent wherever they may be found. It is alleged that respondent has assets in Oregon. (See Reply, pp. 130, 132, 137 and 138-139 Trans. Recd.).

It is, therefore, not a jurisdictional question at all which respondent seeks to argue, but a question of the merits. For it depends entirely upon whether there was a novation of the policies, or whether such attempted novation and respondent's refusal to be bound by the policies constitutes a wrongful cancellation and repudiation of the contracts. If there was a novation, we concede we have no case. If, on the other hand, there was a wrongful cancellation and repudiation of the policies by respondent, we have an action for damages because thereof. But this issue,

made by the pleadings, cannot be determined on this appeal, but constitutes the very merits of the action.

We shall pursue this subject no further, for we do not believe it is here for consideration. It is a matter to be determined upon a trial of the formal issues presented by the pleadings. We have thus briefly alluded to it to show that counsel are wrong in their premises and that the decision of the lower court, and respondent's admission in the lower court, that said court had jurisdiction of the subject matter, are correct.

It is the purpose of this brief to demonstrate that the question as to whether or not the lower court had jurisdiction of the subject matter is not before this court for consideration.

We have undertaken to show that neither in the court below nor in this court has that question been so presented that the court can possibly arrive at a legal certainty of the alleged facts which respondent contends deprives the court of jurisdiction of the subject matter. The procedure adopted to present the question was a proper one by a formal pleading tendering the issue. The issue was made. But no trial thereof was had. Instead, a motion to dismiss was made, supported by affidavits, which were understood by everyone to bear only on the proposition as to how the court should exercise its discretion, if a discretion existed.

Inasmuch as those affidavits and the additional parts of the record, ordered by respondent, can have no possible bearing upon the question raised on the

appeal, viz., whether or not the lower court had any discretion in the matter, it becomes apparent the respondent proposes to use them in some other way. And we anticipate that an attempt will be made to raise and present, on these affidavits, the very question which is the subject of the formal pleadings and upon which there must be a trial before the court can be advised to a legal certainty that the facts alleged and denied are true.

By demanding the printing of this additional and unnecessary record (p. 581-584) Trans. Rec., and p. 238 of Trans. Rec. in case of Herrmann v. N. Y. L. Ins. Co., No. 6406) respondent has compelled appellant to pay in excess of $600.00 in this case—and $210.00 in said Herrmann case, No. 6406, unnecessarily. And it is respectfully requested that this court make a proper order concerning that matter whereby respondent be compelled to pay to the clerk of this court for the benefit of appellant the sums appellant has been compelled to pay for the printing of such immaterial and unnecessary record.

It is respectfully submitted that the judgment of the district court be reversed and the cause be remanded for trial on the merits.

Respectfully submited,

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